

extension and will GRANT Plaintiff's motion for extension of time to file his in forma pauperis application (docket no. 3). The Court will DENY Plaintiff's motions for appointment of counsel (docket nos. 2, 12, 14, 19, 32) without prejudice. The Court will DENY Plaintiff's motions to issue summons (docket nos. 10, 11, 13) and motions to attach evidence and exhibits (docket nos. 25, 27) without prejudice. The Court will DISMISS the complaint with leave to amend. Plaintiff may include supporting documentation of any exhibits with his amended complaint.

BACKGROUND

Plaintiff alleges that he received a letter from his attorney on January 7, 2005 which was opened outside of his presence. Plaintiff claims that he received confidential letters from the State Bar of California on June 26th and June 28th, 2006 which were opened outside of his presence. Plaintiff maintains that each Defendant is involved with his legal mail being opened in the mail room and that the remaining Defendants are a supervisor and the head of the prisons. Plaintiff names the following Defendants: Director of the Department of Corrections and Rehabilitation Jeanne Woodford, PBSP Warden Kirkland, PBSP Captain Patten, and PBSP mail room staff.

DISCUSSION

A. The Merits

1. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that a person

1 acting under the color of state law committed a violation of a right secured by the
2 Constitution or laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988).

3 Liability may be imposed on an individual defendant under section 1983 if the
4 plaintiff can show that the defendant proximately caused the deprivation of a federally
5 protected right. See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988); Harris v. City of
6 Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives another of a
7 constitutional right within the meaning of section 1983 if he does an affirmative act,
8 participates in another's affirmative act or omits to perform an act which he is legally
9 required to do, that causes the deprivation of which the plaintiff complains. See Leer, 844
10 F.2d at 633; Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995).

11 2. Plaintiff's Claims

12 Plaintiff alleges that Defendants opened his legal mail outside of his presence.
13 Prisoners enjoy a First Amendment right to send and receive mail. See Witherow v. Paff,
14 52 F.3d 264, 265 (9th Cir. 1995) (citing Thornburgh v. Abbott, 490 U.S. 401, 407
15 (1989)). A prison, however, may adopt regulations or practices which impinge on a
16 prisoner's First Amendment rights as long as the regulations are "reasonably related to
17 legitimate penological interests." See Turner v. Safley, 482 U.S. 78, 89 (1987). Prison
18 officials may institute procedures for inspecting "legal mail," e.g., mail sent between
19 attorneys and prisoners, see Wolff v. McDonnell, 418 U.S. 539, 576-77 (1974) (incoming
20 mail from attorneys), and mail sent from prisoners to the courts, see Royse v. Superior
21 Court, 779 F.2d 573, 574-75 (9th Cir. 1986) (outgoing mail to court).¹ But the opening
22 and inspecting of "legal mail" outside the presence of the prisoner may have an
23 impermissible "chilling" effect on the constitutional right to petition the government. See
24 O'Keefe v. Van Boening, 82 F.3d 322, 325 (9th Cir. 1996) (citing Laird v. Tatum, 408

26 ¹Mail from the courts, as contrasted to mail from a prisoner's lawyer, is not "legal mail." See
27 Keenan v. Hall, 83 F.3d 1083, 1094 (9th Cir. 1996), amended, 135 F.3d 1318 (9th Cir. 1998).
28 With minute exceptions correspondence from a court to a litigant is a public document. See
Martin v. Brewer, 830 F.2d 76, 78 (7th Cir. 1987).

1 U.S. 1, 11 (1972)); but cf. Keenan v. Hall, 83 F.3d 1083, 1094 (9th Cir. 1996), amended,
2 135 F.3d 1318 (9th Cir. 1998) (prison officials may open and inspect mail to prisoner
3 from courts outside prisoner's presence because mail from courts, as opposed to mail
4 from a prisoner's lawyer, is not "legal mail").² If so, prison officials must establish that
5 legitimate penological interests justify the policy or practice. See O'Keefe, 82 F.3d at
6 327 (mail policy that allows prison mailroom employees to open and read grievances sent
7 by prisoners to state agencies outside prisoners' presence reasonable means to further
8 legitimate penological interests).

9 "Legal mail" may not be read or copied without the prisoner's permission. See
10 Casey v. Lewis, 43 F.3d 1261, 1269 (9th Cir. 1994), rev'd on other grounds, 518 U.S. 343
11 (1996). But again, prison officials may establish that legitimate penological interests
12 justify the policy or practice. See O'Keefe, 82 F.3d at 327.

13 Plaintiff's claim fails at the outset because he fails to set forth specific facts
14 showing how each Defendant proximately caused a constitutional deprivation. For a
15 claim to be cognizable, a Plaintiff must "set forth specific facts as to each individual
16 defendant's deprivation of protected rights." Leer, 844 F.2d at 634. But here, Plaintiff
17 alleges facts without explaining the actions of each Defendant involved. As such,
18 Plaintiff fails to link Defendants to his claim. Accordingly, the complaint does not state a
19 cognizable claim against any of the named Defendants.

20 Plaintiff must allege facts supporting each claim against each individual Defendant
21 separately in his amended complaint showing his entitlement to relief from each
22 Defendant. Plaintiff should list the constitutional right he has, describe what each
23 Defendant did or failed to do, and describe how each Defendant's acts or omissions
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26 ²The Wolff Court declined to decide the constitutional provision under which a prisoner's
27 right to legal correspondence free from government inspection may arise, see Wolff, 418 U.S. at
28 575-76, but recent Ninth Circuit opinions have focused on a prisoner's First Amendment right to
petition the government for redress of grievances, which includes a reasonable right of access to
the courts, see O'Keefe v. Van Boening, 82 F.3d 322, 324-326 (9th Cir. 1996).

1 caused him injury. He should not refer to the defendants as a group, i.e., “the
2 defendants;” rather, he should identify each involved Defendant by name and link each of
3 them to a specific claim by explaining what each Defendant did or failed to do that caused
4 a violation of his constitutional rights.

5 As to Plaintiff’s claim against the Director of the Department of Corrections and
6 Rehabilitation Jeanne Woodford and PBSP Warden Kirkland, Plaintiff is cautioned that
7 there is no respondeat superior liability under Section 1983, i.e. no liability under the
8 theory that one is responsible for the actions or omissions of an employee. Liability
9 under Section 1983 arises only upon a showing of personal participation by the defendant.
10 Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor may be liable under
11 section 1983 upon a showing of (1) personal involvement in the constitutional deprivation
12 or (2) a sufficient causal connection between the supervisor’s wrongful conduct and the
13 constitutional violation. Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir.
14 1991) (en banc) (citation omitted).

15 Plaintiff has named PBSP mail room staff as a Defendant without identifying any
16 names of the individuals in the mail room. The use of “Doe” to identify a defendant is
17 not favored in the Ninth Circuit. See Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir.
18 1980). Accordingly, the PBSP mail room staff is DISMISSED without prejudice. Should
19 Plaintiff learn the identities through the use of discovery and be able to allege facts which
20 directly link them to his claims he may include each Defendants individual name in his
21 amended complaint and/or seek leave to amend his complaint to add them as named
22 Defendants. See Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980).

23 Plaintiff will be given leave to amend the complaint to cure these deficiencies.
24 Accordingly, the Court grants Plaintiff leave to file an amended complaint within **thirty**
25 **days** of the date this order is filed to include sufficient facts to support his claim against
26 each Defendant and the alleged constitutional violation he suffered. Based upon the
27 Court’s dismissal with leave to amend, Plaintiff’s motions to issue summons on the
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1 original complaint (docket nos. 10, 11, 13) are DENIED.

2 **B. Motions for Appointment of Counsel**

3 Plaintiff has filed five motions for appointment of counsel. However, there is no
4 constitutional right to counsel in a civil case. Lassiter v. Dep't of Social Services, 452
5 U.S. 18, 25 (1981). 28 U.S.C. § 1915 confers on a district court only the power to
6 “request” that counsel represent a litigant who is proceeding in forma pauperis. 28 U.S.C.
7 § 1915(e)(1). This does not give the courts the power to make “coercive appointments of
8 counsel.” Mallard v. United States Dist. Court, 490 U.S. 296, 310 (1989).

9 The court may ask counsel to represent an indigent litigant under § 1915 only in
10 “exceptional circumstances,” the determination of which requires an evaluation of both
11 (1) the likelihood of success on the merits and (2) the ability of the plaintiff to articulate
12 his claims pro se in light of the complexity of the legal issues involved. See Rand v.
13 Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997); Terrell v. Brewer, 935 F.2d 1015, 1017
14 (9th Cir. 1991); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986). Both of
15 these factors must be viewed together before reaching a decision on a request for counsel
16 under § 1915. See id. Neither the need for discovery, nor the fact that the pro se litigant
17 would be better served with the assistance of counsel, necessarily qualify the issues
18 involved as complex. See Rand, 113 F.3d at 1525 (where plaintiff’s pursuit of discovery
19 was comprehensive and focused and his papers were generally articulate and organized,
20 district court did not abuse discretion in denying request for counsel).

21 The Court concludes that appointment of counsel is not necessary at this time.
22 The Court has dismissed Plaintiff’s complaint with leave to amend and has yet to review
23 the merits of Plaintiff’s claims in his amended complaint. Accordingly, Plaintiff’s
24 motions for appointment of counsel (docket nos. 2, 12, 14, 19, 32) are DENIED without
25 prejudice.

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C. Motions to Attach Exhibits and Legal Mail

Plaintiff has filed two motions to attach evidence and exhibits and filed several separate exhibits in this action. The Court notes that Plaintiff must include all of his exhibits and attachments with his amended complaint. Plaintiff may not send in attachments and documents separately to be included with his amended complaint. Accordingly, Plaintiff's motions (docket nos. 25, 27) are DENIED without prejudice. Plaintiff may include his supporting documentation with his amended complaint as set forth below.

CONCLUSION

1. Plaintiff's motion for extension of time to file his in forma pauperis application (docket no. 3) is GRANTED.

2. Plaintiff's motions for appointment of counsel (docket nos. 2, 12, 14, 19, 32) are DENIED without prejudice.

3. Plaintiff's motions to attach evidence (docket nos. 25, 27) are DENIED without prejudice.

4. Plaintiff's motion to issue summons on the original complaint (docket nos. 10, 11, 13) are DENIED.

5. Plaintiff's complaint is DISMISSED with leave to amend, as indicated above, within **thirty days** from the date this order is filed. The amended complaint must include the caption and civil case number used in this order (06-4399 JF (PR)) and the words AMENDED COMPLAINT on the first page. Because an amended complaint completely replaces the original complaint, Plaintiff must include in it all the claims he wishes to present. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir.), cert. denied, 113 S. Ct. 321 (1992). Plaintiff may not incorporate material from the original complaint, such as supporting documentation of the prison appeal process, by reference. Plaintiff must include all of his claims and name all Defendants in the amended complaint.


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1 **Failure to file an amended complaint within the designated time will result in the**
2 **Court dismissing the complaint without prejudice for failure to state a cognizable**
3 **claim under 42 U.S.C. § 1983.**

4 6. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
5 Court informed of any change of address by filing a separate paper with the clerk headed
6 "Notice of Change of Address." He must comply with the Court's orders in a timely
7 fashion or ask for an extension of time to do so. Failure to comply may result in the
8 dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b).

9 IT IS SO ORDERED.

10 DATED: 3/23/07


JEREMY FOGEL
United States District Judge

1 A copy of this ruling was mailed to the following:

2 Mario K. Bennett
3 V-23447
4 Pelican Bay State Prison
5 P.O. Box 7500
6 Crescent City, CA 95531-7500
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